IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-760 and 73-772

HENRY L. TOMOW, SR., *et al.*, *Petitioners*,

v.

MENOMINEE ENTERPRISES, INC., *et al.*, *Respondents*.

DALY, and others, *Petitioners*,

v.

NATURAL RESOURCES BOARD, *Respondent*.

On Petitions for Writs of Certiorari to the Supreme Court of the State of Wisconsin

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The National Congress of American Indians, the National Tribal Chairmen's Association, and the University of New Mexico American Indian Law Center respectfully move for leave to file the attached brief amici curiae in these cases. The consent of the at-

torneys representing both sets of petitioners has been obtained. The consent of the attorneys for the Department of Natural Resources of the State of Wisconsin (respondent in *Daly* v. *Natural Resources Board*) has been obtained. The consent of the attorneys for N. E. Isaacson and Associates, Inc. (respondent in *Tomow* v. *Menominee Enterprises, Inc.*) has been requested but refused.

The interest of the National Congress of American Indians ("NCAI") arises from the fact that NCAI is a non-profit association of some 147 Indian tribes, whose purpose is to promote the interests of American Indians. NCAI is deeply concerned with the decisions of the Wisconsin Supreme Court because they represent two more examples of non-Indian interests usurping control of Indian lands and denying Indian treaty rights despite express Federal guarantees.

The National Tribal Chairmen's Association ("NTCA") is a non-profit organization of all duly-constituted chairmen, presidents, governors and chiefs of federally-recognized Indian tribes, and the presidents of the twelve Alaska regional corporations created by the Alaskan Natives Claims Settlement Act. NTCA joins as an amicus curiae because one of the purposes of NTCA, as expressed in its constitution, is to assure that treaty rights and federal privileges for the protection of the natural resources of Indian lands are fully enforced.

The University of New Mexico American Indian Law Center is an institute providing legal research and technical assistance on matters respecting Indian resources and treaty rights. The Law Center joins as an amicus curiae, believing that the retention of treaty rights by the Menominee Indians at their

termination requires that, on judicial review, a court must apply Indian law principles in order properly to interpret a provision of the Menominee Termination Plan restricting the alienation of Indian land.

The decision below of the Wisconsin Supreme Court rests upon an interpretation of the Menominee Termination Plan which ignores Federal treaties as well as long-standing congressional policies restricting non-Indians from taking Indian lands. Accordingly, the decisions establish a standard of review which would result in the impairment of Indian rights not only for the terminated Menominee and other terminated tribes, but also for federally-recognized tribes throughout the land. Amici seek to file the attached brief to advise the Court of the impact of the decisions below on Federal Indian law generally and on the many tribes, other than the Menominee, who will be adversely affected by those decisions.

Respectfully submitted,

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BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION, UNIVERSITY OF NEW MEXICO AMERICAN INDIAN LAW CENTER, AS AMICI CURIAE IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

INTERESTS OF AMICI CURIAE

The interests of the three amici curiae are set forth in the accompanying Motion for Leave to File Brief Amici Curiae.

STATEMENT OF THE CASES

Amici hereby adopt the statements as set forth in the two petitions.

REASONS FOR ALLOWING THE WRITS

Introduction

The basic question in these companion petitions is whether the Menominee Termination Plan reserves to tribal members the right to approve sales of tribal lands to non-Indians. Article XII of the Menominee Enterprises, Inc. ("MEI") articles of incorporation, which were part of the Termination Plan provided for in the Termination Act and approved by the Secretary of Interior, prohibits such land sales unless "authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock . . . ." The petitioners contend, and the trial court agreed, that "holders of the shares" means the Menominee tribal members themselves, who hold certificates representing MEI shares of stock; this meaning, they contend, is apparent when the language of article XII is read in the context of the rest of the Termination Plan and when the intent of Congress, the Secretary, and the tribal members themselves is considered. The Wisconsin Supreme Court disagreed, holding that all shares are "held" by a voting trust and that the voting trust could, acting without the approval of the tribal members, transfer ancestral tribal land to non-Indians. The court below found it

unnecessary to construe the relevant language in favor of the Tribe or to analyze the intent of Congress, of the Secretary of the Interior, or of the Tribe.

We do not plan here to discuss the facts and legal principles which have been admirably presented in both petitions. We will, however, offer the judgment of amici as to the manner in which the two opinions below emasculate essential legal principles which apply to, and protect, all American Indian tribes and their members. Ultimately, as will be seen, the Wisconsin Supreme Court simply ignored Federal Indian law and congressional intent in these cases; much to the contrary, both cases demand that the starting point be basic Indian law principles. A more specific discussion follows.

This Court Should Issue a Writ of Certiorari To Correct the Wisconsin Supreme Court's Failures (1) To Apply Applicable Federal Indian Law Doctrines, (2) To Recognize Important Menominee Treaty Rights, and (3) To Review the Termination Plan in Light of the Expressed Intent of Congress, of the Secretary of the Interior, and of the Menominee Tribe.

Before termination, the Federal Government had the duty and power to manage the Menominee tribal land for the benefit of the Tribe. *See, e.g., Shoshone Tribe* v. *United States*, 299 U.S. 476, 497 (1937). This duty arose, in regard to the "Menominee", from the Wolf River Treaty of 1854, where the "Menominee" were guaranteed that their ancestral land would be "held as Indian lands are held."[1] Such treaty rights

[1] This Court implied the existence of hunting and fishing rights from the language of the Menominee Treaty establishing the reservation "for a home, to be held as Indian lands are held" by looking to the surrounding circumstances of the treaty, by construing the treaty as the Indian people would have understood it and by comparing the provisions of other treaties. *Menominee*

have historically been protected by the government. Thus, this Court has recognized that "in carrying out its treaty obligations with the Indian tribes the Government . . . has charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation* v. *United States,* 316 U.S. 286, 296-297 (1942).[2] Furthermore, in determining the scope of the treaty rights to be protected, the rights must be analyzed in terms of what was intended and understood by the Indian tribes themselves. *See, e.g., Seufert Brothers* v. *United States,* 249 U.S. 194, 198 (1919); *Tulee* v. *Washington,* 315 U.S. 681, 684-685 (1942).

In fulfilling its duty to protect Indian trust lands, Congress has imposed many restrictions on the alienation of tribal land. The Indian Non-Intercourse Act includes several provisions explicitly protecting Indian lands from acts of non-Indians and expressly makes invalid any conveyance of land from any Indian nation or tribe unless approved by congressional treaty or convention. *See* 25 U.S.C. § 177. Lands

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Tribe v. *United States,* 391 U.S. 404, 405 (1968). A similar analysis here demonstrates that the Menominee Indians reserved in the Wolf River Treaty the right to occupy and protect Indian lands from unlawful taking by non-Menominee. Indeed, this Court has ruled that for all practical purposes, a tribe receiving by treaty unrestricted possession of lands, effectively owns the lands so reserved. *United States* v. *Shoshone Tribe of Indians,* 304 U.S. 111 (1938). *See also, United States* v. *Santa Fe Pacific Railroad Co.,* 314 U.S. 339 (1941), where this Court described Indian possession of Indian lands to be "as sacred as the fee simple of whites" [314 U.S. at 345], and hence protected from unconsented taking.

[2] This Court has repeatedly recognized the federally-secured right of Indian lands to be free of unauthorized occupancy by third parties. *See, e.g., Shoshone Tribe* v. *United States,* 299 U.S. 476, 497-498 (1937); and *Buttz* v. *Northern Pacific Railroad Co.,* 119 U.S. 55 (1886).

granted to tribes by Executive Order cannot be transferred without a specific Act of Congress. *See* 25 U.S.C. § 398d. Tribes subject to the Indian Reorganization Act, as were the Menominee, are permitted to prevent the sale of tribal lands without the consent of the tribe. *See* 25 U.S.C. § 476. For other restrictions on the use of Indian land, *see, e.g.,* 25 U.S.C. §§348, 391, 392, and 393. In addition, Indian treaties have expressly prohibited access to, as well as ownership of, Indian lands by non-tribal members;[3] many later treaties included requirements for tribal consent to subsequent cessions of Indian lands.[4] Congress has imposed numerous other restrictions in furtherance of its trust duty, but there is no need to enumerate them here; the important point is that restrictions on the alienability of Indian land to non-Indians have always been a keystone of Federal Indian policy.[5]

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[3] Treaty of May 24, 1834 between United States and Chickasaw; 7 Stat. 450; Treaty of March 6, 1861 between United States and Sacs, 12 Stat. 1171; Treaty of July 2, 1791 between United States and the Cherokee Nation, 7 Stat. 39.

[4] For example, the Treaty of October 28, 1867 between the United States and the Cheyenne and Arapaho Tribes reserved to the tribes the right to refuse any cession of the reservation unless three-fourths of the adult male Indians occupying the lands consented. 15 Stat. 593. Similar treaty provisions requiring the specific consent of three-quarters of the tribal members for the disposition of tribal lands are included in the Treaty of March 2, 1886, between the United States and the Ute Indians, 15 Stat. 619, and in the Treaty of April 29, 1868, between the United States and the Sioux, 15 Stat. 635.

[5] The leading authority on Indian law has recognized that "the control by Congress of tribal lands has been one of the most fundamental expressions, if not the major expression, of the constitutional powers of Congress over Indian Affairs . . . ." COHEN, FEDERAL INDIAN LAW 94 (U.N. Mex. 1971 Ed.).

The above, then, was the nature of the trust responsibility to the Menominee before termination. The next question is the extent to which that status may have been altered by termination.

The Menominee people still exist as a tribe. *See., e.g., Menominee Tribe of Indians* v. *United States,* 388 F.2d 998, 1000-1001 (Ct. Cl. 1967), and the authorities cited there.[6] Treaty rights of the Menominee tribal members remain intact unless specifically abrogated by Congress. *Menominee Tribe* v. *United States, supra.* In addition, and importantly, Congress continues to have a "continued partial guardianship"—*exercised by means of the very termination plan squarely at issue here*—over the affairs of the Menominee Tribe. *See Otradovec* v. *First Wisconsin Trust,* 454 F.2d 1258, 1261 (7th Cir. 1972), where the Court held that the Menominee Termination Plan validly imposed restrictions on individual Menominee concerning the transfer of personal property. The Menominee termination was not limited to restrictions on individual Menominee; tribal real property and interests in the tribal corporation were also restricted by the Act itself.[7] Although not speaking in the con-

[6] This Court, of course, affirmed the Court of Claims decision in *Menominee Tribe* v. *United States,* 391 U.S. 404 (1968). The Supreme Court opinion in no way cast doubt upon the Court of Claims' reasoning as to the continued existence of the Menominee Tribe; in fact, the detailed statutory analysis by the Court of Claims is virtually unimpeachable. *See also Reed* v. *United States National Bank of Portland,* 213 F.Supp. 919, 922 (D. Ore. 1963), holding that members of the terminated Klamath Tribe remained tribal members until they affirmatively chose to withdraw.

[7] 25 U.S.C. § 896 provides that the termination plan shall provide for "future control of the tribal property" and that "the plan shall contain provision for protection of the forest on a sustained yield basis for the protection of the water, soil, fish

text of termination, this Court has also recognized Congress' right to impose restrictions on Indians after emancipation from Federal control:

> "It rests with Congress to determine the time and extent of emancipation . . . . Congress may relieve the Indians from such guardianship and control, in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property, or give to them a partial emancipation . . . ." *United States* v. *Waller*, 243 U.S. 452, 459-460 (1917).

The ultimate question in these cases, then, is how Congress intended to protect against loss of tribal land. We know that the Termination Act, and the importance supplemental plan which is most directly involved here, were basically a congressional redefinition of the Menominee tribal rights, with close cooperation from the Tribe itself and from the Secretary of the Interior. We also know that Congress has always given its most careful consideration to the question of alienation of Indian lands. Accordingly, we think that the guiding test for this Court should be the following statement from *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 345 (1941):

> " 'Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian rights of occupancy, *which could only*

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and wildlife." 25 U.S.C. § 893 requires that interests in MEI "shall be alienable only in accordance with such regulations as may be adopted by the tribe." Congress was careful to assure that these protections continued for the benefit of the Tribe by requiring the Secretary of the Interior, acting in his capacity as trustee of the Menominee lands, to approve the termination plan only if he found that the plan adequately protected the interests of the Menominee tribal members and that the plan complied with Federal law. 25 U.S.C. § 896.

be interferred with or determined by the United States.'" (emphasis supplied)

The above analysis points out the crucial error made by the court below: in neither case did the court make any effort whatsoever to analyze what was "determined by the United States," by the Tribe, or by the Secretary of the Interior in regard to the nature of Menominee tribal land holdings after termination. In neither case did the court liberally construe the relevant provisions in favor of the Tribe. *See, e.g., Choate* v. *Trapp,* 224 U.S. 665 (1912). Rather, the Wisconsin Supreme Court simply analyzed—virtually in a vacuum—a single phrase in the MEI corporate articles of incorporation.

We will not here advise the Court in detail as to what was intended by Congress, by the Tribe, or by the Secretary of the Interior—the important point is that the court below simply failed to analyze such intent at all. In general, however, we are confident that the legislative history involved here, as well as the intent of the Tribe and the Secretary, will indeed show that one of the basic objects of all concerned parties was to avoid a "land grab" of Menominee land by non-Indians. 99 CONG. REC. 9746 (Aug. 24, 1953). Unfortunately, the court below treated these cases in a narrow, corporate context without recognizing that these cases involve Indian lands, Indian treaty rights, and the intent of Congress in regard to those rights. The result, of course, was approval by the Wisconsin Supreme Court of the transfer to non-Indians of ancestral Menominee land by just seven people, three of whom were non-Menominee.

The principles involved here touch upon basic rights of all Indian tribes. It is important that this Court

clarify the standards of judicial review when courts deal with the unique rights in land held by Indian tribes pursuant to Indian treaty. Time and time again, this Court has found it necessary to review the decisions of lower courts which have infringed upon Indian rights by failing to give adequate consideration to applicable Indian treaties, statutes, and congressional policies concerning Indians. For example, in four recent Indian law cases cited by this Court, certiorari was granted to review decisions of state appellate courts where the state courts' standards of review precluded the consideration of those Federal rights unique to Indian people. *See Mattz* v. *Arnett,*——— US———, 37 L.Ed. 2d 92 (1973); *McClanahan* v. *State Tax Commission,*———US———, 36 L.Ed.2d 129 (1973); *Poafpybitty* v. *Skelly Oil Co.,* 390 U.S. 365 (1968); and *Williams* v. *Lee,* 358 U.S. 217 (1959). Thus, this Court has repeatedly held that, because Federal Indian rights set Indian people apart from ordinary citizens, judicial review of matters affecting Indians must account for such rights:

> "We agree . . . that Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. We also agree that, to be valid, exemptions to tax law should be clearly expressed. *But we cannot agree that taxability of respondents in these circumstances is unaffected by the treaty, the trust patent or the Allotment Act.*" (emphasis supplied) *Squire* v. *Capoeman,* 351 U.S. 1, 6 (1956).

CONCLUSION

In the final analysis, standards of judicial review constitute the last barriers against the loss of Indian treaty rights and against the diminution of tribal land

bases. Beginning as long ago as Chief Justice Marshall's opinion in *Cherokee Nation* v. *Georgia,* 30 U.S. 1 (1831), this Court has sifted through almost countless treaties, statutes, and Executive Orders—many of which were broken or simply ignored—and has arrived at specific standards of judicial review which apply to the unique field of Federal Indian law.

Here, rather than following such well-established principles, the Wisconsin Supreme Court applied straight corporate law to a land transaction which threatens to cost the Menominee Tribe its ancestral heartland. Such an approach is wholly unwarranted in these cases which involve the direct products of termination, now repudiated by Congress, but once the central Federal Indian policy for the better part of two decades. In a word, these are Federal Indian law cases, not state corporate law cases.

Amici urge this Court once again to exercise the vigilance it has so often shown in protecting Indian rights and to grant certiorari to review the decisions of the Wisconsin Supreme Court.

Respectfully submitted,

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